

*United States Government*  
***National Labor Relations Board***  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: November 28, 2018

TO: Ronald K. Hooks, Regional Director  
Region 19

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Pacific Maritime Association (PMA)  
Case 19-CA-215375

524-8369  
524-5096-2514-0000  
524-5096-7525-0000

The Region submitted this case for advice as to whether Pacific Maritime Association (“PMA”) violated Section 8(a)(1) and (3) by co-determining with ILWU Local 23 (the “Union”) that an employee (“Employee #1”) would be deregistered from the dispatch hall that PMA and the Union jointly and equally operate together, where the Region has already concluded that, for its part of the dispatch hall’s decision, the Union acted arbitrarily in violation of its duty of fair representation.

We conclude that PMA violated Section 8(a)(1) and (3), even though there is no evidence that PMA acted in retaliation for Employee #1’s protected concerted or union activities, because PMA not only knew about, but actively participated in, the arbitrary decisions to give a probationary warning and then deregister Employee #1 from the dispatch hall register. PMA, acting through its representatives on JPLRC, considered the evidence presented, moved for discipline in both instances, and then voted to impose the disciplines.

FACTS

PMA is a non-profit multiemployer bargaining representative that jointly operates exclusive dispatch hiring halls through Joint Port Labor Relations Committees (“JPLRC”) with the International Longshore and Warehouse Union (“ILWU”) through its approximately 32 local unions on the West Coast. PMA and the ILWU share an equal number of representatives and an equal vote on each JPLRC. One of the ILWU local unions is the Union, which is located in Tacoma, Washington.

The Tacoma JPLRC meets monthly and is responsible for maintaining and operating the exclusive dispatching hall, exercising control over the lists of registered employees, and investigating and adjudicating all dispatch hall disputes.

According to PMA, the JPLRC makes employment eligibility decisions based on factors important to the employers, not the Union. However, the decisions cannot be implemented absent consent of the Union. There are three types of workers registered to be dispatched from the hiring hall: Class A registrants, who have top priority for dispatch; Class B registrants, who normally spend approximately five years in that category before they become Class A registrants; and ID Casuals. In order to remain in good standing, Class B registrants must work 20 shifts in a four-week payroll month or 25 shifts in a five-week payroll month.

Each month, PMA generates a report listing shifts by each active worker within the previous month and notes the deadline for excuses for missed shifts at the dispatch hall. Workers may then bring their excuses, including medical excuses, for missed shifts to the hall to be date-stamped by the Union secretaries. The worker is given copies of the date-stamped excuses. The Union then prepares an internal summary chart of excuses, and workers who failed to work the requisite shifts without a sufficient, timely excuse are cited by the Union and PMA to appear before the JPLRC at its next monthly meeting. The citation does not explain the reason for the deficiencies, including if certain excuses were not accepted. PMA asserts that if workers want to know the reason for the citation, they may contact their Union representative on the JPLRC. The JPLRC's written rules do not permit a worker to cure a deficiency that was their fault at the monthly meeting, for instance by submitting a medical excuse there for the first time. A Class B registrant's first discipline results in a probationary warning, which delays the admission to Class A registrant by six months. The same registrant's second discipline results in deregistration.

Employee #1 is a longshore worker who had been classified as Class B since (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) received a citation to appear before the JPLRC at its (b) (6), (b) (7)(C) 2017 hearing but did not know the reason for the citation.<sup>1</sup> (b) (6), (b) (7)(C) believed that (b) (6), (b) (7)(C) had submitted all of (b) (6), (b) (7)(C) required medical excuses for (b) (6), (b) (7)(C) missed June shifts in a timely manner. At the hearing, one of the PMA representatives told Employee #1 that (b) (6), (b) (7)(C) was short on June shifts. Employee #1 asked if they had counted (b) (6), (b) (7)(C) unstamped medical note, which (b) (6), (b) (7)(C) brought with (b) (6), (b) (7)(C) to the meeting. The Union JPLRC representative confirmed that Employee #1 would have satisfied (b) (6), (b) (7)(C) June shifts requirement had the note been stamped. Employee #1 explained that (b) (6), (b) (7)(C) had brought that note along with others to be stamped and that (b) (6), (b) (7)(C) must have made an error. The JPLRC did not find this explanation to be credible, and it refused to accept the medical note at the JPLRC hearing. The PMA representatives recommended that the JPLRC issue Employee #1 a probationary warning, and the Union representatives concurred.

---

<sup>1</sup> All dates are in 2017 unless otherwise indicated.

Employee #1 received a second citation to appear before the JPLRC at its (b) (6), (b) (7)(C) hearing. Employee #1 had submitted medical notes to excuse (b) (6), (b) (7)(C) missed August shifts. Five days before the hearing, Employee #1 left a voicemail message for (b) (6), (b) (7)(C) on the JPLRC, asking (b) (6), (b) (7)(C) what the deficiency was so that (b) (6), (b) (7)(C) could correct it. (b) (6), (b) (7)(C) never returned (b) (6), (b) (7)(C) call. When Employee #1 appeared at the (b) (6), (b) (7)(C) hearing, (b) (6), (b) (7)(C) was informed that the dates the physician had written on one of (b) (6), (b) (7)(C) stamped, timely medical notes were not within the August payroll period. Employee #1 said that (b) (6), (b) (7)(C) had thought the error was that one of (b) (6), (b) (7)(C) medical notes was missing an address, and that (b) (6), (b) (7)(C) now realized that the doctor had made a mistake regarding the dates. The PMA representatives moved for Employee #1 to be deregistered, and the Union representatives concurred. Right after the hearing, (b) (6), (b) (7)(C) who had failed to return Employee #1's phone call told (b) (6), (b) (7)(C) that had (b) (6), (b) (7)(C) brought a medical note with the correct dates to the hearing, (b) (6), (b) (7)(C) would not have been deregistered. Employee #1 brought a corrected medical note to the dispatch hall the next day, but the JPLRC did not change its determination to deregister (b) (6), (b) (7)(C).

The Region obtained evidence of comparable cases from the Union. Another Class B registrant, Employee #2, was cited to appear at the (b) (6), (b) (7)(C) JPLRC hearing. One of (b) (6), (b) (7)(C) medical excuses covered the wrong period causing (b) (6), (b) (7)(C) to fall short of (b) (6), (b) (7)(C) required June shifts. However, Employee #2 appeared at the JPLRC hearing with an additional medical note that covered the correct period. The medical note was stamped as being received the day of the JPLRC hearing and was therefore technically untimely under JPLRC rules. Nevertheless, the JPLRC decided to accept the late medical note at the hearing and not issue Employee #2 a warning. The JPLRC also accepted the corrected medical note of Employee #3—brought for the first time to a (b) (6), (b) (7)(C) JPLRC hearing—that enabled Employee #3 to meet (b) (6), (b) (7)(C) required September shift hours to avoid a probationary warning.

### ACTION

We conclude that PMA violated Section 8(a)(1) and (3) because PMA not only knew about, but actively participated in, the JPLRC's arbitrary decisions to give a probationary warning and then deregister Employee #1 from the dispatch hall register. PMA, acting through its representatives on JPLRC, considered the evidence presented, moved for discipline in both instances, and then voted to impose the disciplines.<sup>2</sup>

---

<sup>2</sup> The Region has determined in Case 19-CB-212192 that the JPLRC's probationary warning and deregistration of Employee #1 was arbitrary and that the Union violated its duty of fair representation through its conduct in the JPLRC.

As an exclusive bargaining representative, a union has a statutory obligation to represent the interests of its members fairly, impartially, and in good faith, insuring that all employees are free from unfair treatment, hostility, discrimination, arbitrariness, or capriciousness.<sup>3</sup> It is well-settled that “a union’s duty of fair representation extends to its operation of an exclusive hiring hall . . . .”<sup>4</sup> Under the duty of fair representation standard, a union’s actions are arbitrary “if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.”<sup>5</sup> Such arbitrariness can be shown by a union’s disparate treatment of one worker compared to others who are similarly situated.<sup>6</sup>

In this case, the Region correctly determined that the Union acted arbitrarily in its JPLRC role in violation of its duty of fair representation. When it issued a probationary discipline to Employee #1 for failing to have date-stamped one of [REDACTED] medical excuse notes that [REDACTED] brought with [REDACTED] to the [REDACTED] JPLRC hearing, JPLRC was treating [REDACTED] differently than both Employee #2 and Employee #3, from whom it accepted late medical notes at their hearings. Moreover, the JPLRC [REDACTED] (b) (6), (b) (7)(C) admitted that JPLRC accepts late notes brought to hearings when it told Employee #1 after [REDACTED] (b) (6), (b) (7)(C) hearing that [REDACTED] would not have been deregistered had [REDACTED] brought the corrected doctor’s note to that hearing. Although the Union and PMA assert that Employee #1 lied about whether the medical note was date stamped in the first instance, [REDACTED] credibility as to that is only relevant to the question of whether or not [REDACTED] presented the note to the hall; regardless of whether [REDACTED] presented the note to the hall, it should have been accepted at the hearing given that JPLRC has accepted late medical notes at other employees’ hearings.

Similarly, the JPLRC treated Employee #1 arbitrarily when it deregistered [REDACTED] because [REDACTED] doctor had entered incorrect dates on [REDACTED] medical excuse note for [REDACTED] missed A just shifts. Although Employee #1 did not bring a corrected note to the

---

<sup>3</sup> See *Teamsters Local 814 (Beth Israel Medical)*, 281 NLRB 1130, 1146 (citing *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

<sup>4</sup> *SSA Pacific, Inc.*, 366 NLRB No. 51, slip op. at 16 (Apr. 3, 2018) (internal citations omitted).

<sup>5</sup> *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991) (internal quotation omitted).

<sup>6</sup> See, e.g., *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1169 (2006) (finding disparate treatment of a worker undermined union’s argument that it refused to refer him due to poor performance because it referred workers whose performance was even worse), *enforced*, 315 F. App’x 318 (2d Cir. 2009).

(b) (6), (b) (7)(C) hearing, the citation did not inform (b) (6), (b) (7)(C) of the deficiency with the notes (b) (6), (b) (7)(C) had submitted. Further, (b) (6), (b) (7)(C) attempted to contact (b) (6), (b) (7)(C) JPLRC (b) (6), (b) (7)(C) prior to the hearing, but (b) (6), (b) (7)(C) did not return (b) (6), (b) (7)(C) voicemail message. Had either the citation or (b) (6), (b) (7)(C) timely explained the defect in Employee #1's paperwork, (b) (6), (b) (7)(C) could have brought the corrected note to the hearing, rather than bringing it too late to the dispatch hall the following day.<sup>7</sup>

We further conclude that PMA, which shared equally in the voting power to discipline and deregister Employee #1, and was the party to move for both disciplines, violated Section 8(a)(1) and (3) for its role in JPLRC's arbitrary actions. Although an employer generally does not violate the Act for its merely arbitrary conduct against an employee, it is well established that when an employer delegates its otherwise exclusive hiring authority to a union, that employer may share liability when the union exercises that authority in an unlawful (e.g., arbitrary) manner. Thus, in *Miranda Fuel Co.*, the Board concluded that an employer violated Section 8(a)(3) when it agreed to the union's demand to reduce an employee's seniority for an arbitrary reason unauthorized under the contract.<sup>8</sup> The Board stated: "The right to hire and fire and to control tenure of employment is an employer's alone; and where an employer does delegate or surrender hiring and firing and related authority to a labor organization, the employer is responsible, so far as th[e] Act is concerned, for the delegation."<sup>9</sup>

---

<sup>7</sup> See, e.g., *Mail Handlers Local 307 (Postal Service)*, 338 NLRB 1154, 1164 (2003) ("a union's duty of fair representation includes the duty to . . . [not] willfully keep [employees] uninformed" about their grievance) (citing *Postal Workers Union*, 328 NLRB 281, 282 (1999)).

<sup>8</sup> 140 NLRB 181, 186 (1962), *supplementing* 125 NLRB 454 (1959), *as remanded at* 284 F.2d 861 (2d Cir. 1960), *enforcement denied*, 326 F.2d 172 (2d Cir. 1960). The Supreme Court in dicta has affirmed *Miranda Fuel*, including quoting with approval its language finding that arbitrary hiring hall decisions can constitute Section 8(a)(1) and (3) violations. See, e.g., *Breininger v. Sheet Metal Workers Int'l Ass'n Local 6*, 493 U.S. 67, 74, 86 (1989); *Vaca v. Sipes*, 386 U.S. 171, 178 (1967).

<sup>9</sup> 140 NLRB at 188. Since *Miranda Fuel*, the issue of an employer's liability for arbitrary hiring hall decisions has been addressed in only one Board decision. See *Nat'l Elec. Contractors Ass'n (IBEW Local 164)*, 190 NLRB 196, 197-98 (1971) (finding no Section 8(a)(1) and (3) violation because the union and employer did not act arbitrarily when changing the hiring hall rules), *enforced*, 457 F.2d 871 (3d Cir. 1972).

Similarly, the Board in *General Cinema Corp.* found that an employer violated Section 8(a)(3) and (1) where it staffed its jobs exclusively through the union's hiring hall referrals and the union effectively denied access to the hiring hall on the basis of race.<sup>10</sup> The Board concluded that the employer's NLRA liability was established because it delegated its hiring authority to the union through the establishment of the exclusive hiring hall. Accordingly, the employer's delegation created a nexus to Section 7 and the NLRA remedial scheme that would not have existed had it continued to make hiring decisions on its own.<sup>11</sup>

Applying these principles to PMA and a different ILWU local in an earlier dispatch hiring hall case, the Board affirmed an ALJ's determination that the union violated Section 8(b)(1)(A) and (2) by discriminatorily refusing to dispatch employees from the exclusive hiring hall because of their gender.<sup>12</sup> As in the instant case, the

---

<sup>10</sup> 214 NLRB 1074, 1076 (1974), *enforced*, 526 F.2d 427 (5th Cir. 1976). Although the Board observed that the employer knew or "had compelling reason to surmise" that the union was operating the hiring hall in a discriminatory manner, *id.* at 1076, it did not rely on that knowledge, because, at the time, employers were held strictly liable for unions' discriminatory operation of an exclusive hiring hall. *Id.* at 1076 & n.14 (citing *Morrison-Knudsen Co.*, 123 NLRB 12 (1959), *enforced*, 275 F.2d 914, 917 (2d Cir. 1960)). The Board began formally applying a knowledge requirement, in lieu of the strict-liability standard, in *Wolf Trap Foundation for the Performing Arts*, 287 NLRB 1040, 1041 (1988) (rejecting strict liability and concluding that, although the union acted unlawfully by operating the exclusive hiring hall so as to discriminate on the basis of gender, the employer did not violate Sections 8(a)(3) and (1), because it lacked actual knowledge of the discrimination).

<sup>11</sup> In his decision, modified on other grounds by the Board, the ALJ distinguished the facts from those in *Jubilee Mfg. Co.*, 202 NLRB 272, 272-73 (1983), *aff'd mem.*, 504 F.2d 271 (D.C. Cir. 1974), where the Board held that an employer's discrimination on the basis of race, color, religion, sex, or national origin does not violate the Act *per se* without actual evidence of a nexus between the discriminatory conduct and the interference with Section 7 activity. 214 NLRB at 1076, 1082. *See also Cargo Handlers, Inc.*, 159 NLRB 321, 340-41 & n.22 (1966) (employer that conducted its hiring only through the union hiring hall found liable under Section 8(a)(1) and (3) for the union's racist referral practices); *Int'l Longshoremen Ass'n, Local 1367 (Galveston Maritime Ass'n)*, 148 NLRB 897, 898 (1964) (employer liable under 8(a)(3) for union's enforcement of racially discriminatory quotas in hiring hall), *enforced per curium*, 368 F.2d 1010 (5th Cir. 1966).

<sup>12</sup> *Pacific Maritime Assn.*, 209 NLRB 519, 519, 525-26 (1974).

dispatch hiring hall in *Pacific Maritime Assn.* was operated by a JPLRC consisting of representatives from PMA and the local union, with each side having equal voting power in dispatch hall decisions.<sup>13</sup> Moreover, as in the instant case, PMA was actively involved in the dispatch hall conduct found to violate the Act.<sup>14</sup> Thus, the Board concluded that PMA violated Section 8(a)(1) and (3) because, as in *Miranda Fuel*, PMA participated in the union's unlawful action against employees through the JPLRC and allowed the union to cause it to derogate the employment status of an employee.<sup>15</sup>

The Board's standard is sound. Having the employer's liability under the NLRA mirror that of the union when it cedes its hiring responsibility to the union and knows of the union's unlawful acts makes important policy sense. Otherwise, with no legal risk to itself, an employer could pressure a union to either act unlawfully or risk a withdrawal of its hiring authority, thus creating tension between the union's duty of fair representation and its institutional interest in operating a hiring hall for the benefit of the employees it represents.<sup>16</sup> Moreover, it would be impossible for joint dispatch halls, like the ones PMA co-operates with equal voting power, to function effectively if each side were held to different legal standards but still had to reach consensus on the proper result.<sup>17</sup> Finally, employees may not understand a notice posting in which only the union admits it acted unlawfully when the employee knows that the employer actively participated in the unlawful decision.

---

<sup>13</sup> *Id.* at 520.

<sup>14</sup> *Id.* at 525 (“[T]he three PMA officials not only knew of, acquiesced in, and condoned [the union’s] conduct, but gave it credence by advising the women, albeit falsely, that they had to be ‘invited’ into the dispatch hall and also take a test in order to qualify for a checker’s job, both assertions obviously designed to discourage them from further pursuing employment through the joint dispatch hall.”).

<sup>15</sup> *Id.* at 525-26.

<sup>16</sup> As the Supreme Court has recognized, hiring halls can be valuable to unions and the employees they represent. See *Int’l Bhd. of Teamsters, Local 537 v. NLRB*, 365 U.S. 667, 675 (1961).

<sup>17</sup> This issue recurs in the context of PMA’s hiring hall. Each of the ILWU locals along the West Coast operates a hiring hall with PMA, and there are 14,000 ILWU-represented employees. See <http://www.pmanet.org/the-ilwu-workforce> (last visited Nov. 26, 2018).



There is no merit to PMA's argument that the precedent discussed above should not be applied because the current Board implicitly overruled those cases by applying a *Wright Line* standard in *SSA Pacific, Inc.*<sup>18</sup> In *SSA Pacific*, the Board applied *Wright Line* because there was a question of whether the employee was unlawfully suspended for requesting dispatch records due to her protected Section 7 activity.<sup>19</sup> There is no reason to conclude that the Board intended to overrule well-established principles covering employer liability where there is no allegation of an unlawful retaliatory motive against Section 7 activity. We further note that, here, all parties agree that Employee #1 was not disciplined or deregistered in retaliation for engaging in Section 7 activity.

Applying the principles in extant law to the instant case, we conclude that PMA violated Section 8(a)(1) and (3) because it not only knew about but actively participated in the arbitrary decisions to give a probationary warning and then deregister Employee #1 from the dispatch hall register. PMA, acting through its representatives on JPLRC, considered the evidence presented, moved for discipline in both instances, and then voted to impose the disciplines.

Finally, PMA argues that, as a matter of policy, it should not be found liable because the JPLRC maintains well-established processes for employees to submit excuses for failing to meet shift-availability requirements, and the current system, in which the ILWU local and PMA have equal power over employment-eligibility decisions, generally provides greater, not lesser, worker protections from unfair labor practices. We reject these arguments because, notwithstanding that the JPLRC maintains certain institutional processes and may provide better worker protections than union-run hiring halls, there are gaps in those processes and protections that led to the arbitrary conduct that occurred here. Thus, the JPLRC provides insufficient information in the citation itself for workers to identify and understand the deficiencies that could lead to their discipline at the monthly JPLRC hearing, and the problem is compounded by the fact that (b) (6), (b) (7)(C) does not always return workers' phone calls to explain why they were issued a citation. Moreover, the JPLRC rules do not consistently provide workers with an opportunity to cure the alleged deficiency at the hearing. PMA would significantly reduce the likelihood of liability for arbitrary JPLRC decisions in these contexts if JPLRC were to (1) begin

---

<sup>18</sup> 366 NLRB No. 51 (Apr. 3, 2018).

<sup>19</sup> *Id.*, slip op. at 1. See *Tampa Tribune*, 351 NLRB 1324, 1327 n.14 (2007) (“[c]ontrary to the Respondent’s contentions, we do not apply *Wright Line* . . . in the absence of a dispute about the Respondent’s motive”) (internal citation omitted), *enforced in part*, 560 F.3d 181 (4th Cir. 2009).



providing sufficient information in the citations to allow workers to adequately prepare for the hearing; or (2) continue its current practice of issuing abbreviated citations, but use the hearings to explain the reason for the citation and consistently allow workers to present additional evidence or explanation to support their case at the hearing or, at the worker's election, within a reasonable time thereafter.

Accordingly, absent settlement, the Region should issue complaint alleging that PMA violated Section 8(a)(3) and (1) through the actions of the JPLRC to discipline and deregister Employee #1.

/s/  
J.L.S.

ADV.19-CA-215375.Response.PMA (b) (5), (9)